NO. 34135

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

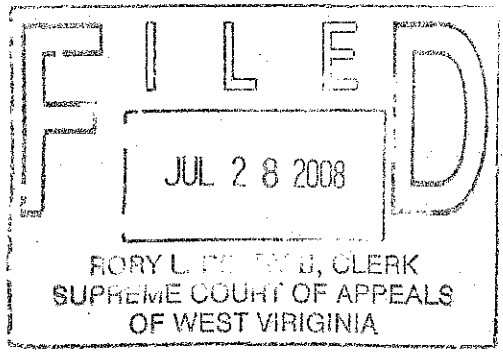
RYAN STRICK,

Petitioner Below/Appellant,

v.

THE STATE OF WEST VIRGINIA, AND JOSEPH CICCHIRILLO, COMMISSIONER; WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

Respondent Below/Appellee.



BRIEF OF APPELLEE

Respectfully submitted,

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BRIEF OF APPELLEE

Comes now the Appellee, the State of West Virginia and Joseph Cicchirillo, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "the Division"), by counsel, Janet E. James, Assistant Attorney General, and submits this brief in response and opposition to the *Petitioner's Brief*, filed on behalf of Ryan Strick, in which Appellant appeals the denial of a *Petition for Judicial Review* by *Order* of the Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County, entered on October 25, 2007.

I.

KIND OF PROCEEDING AND THE NATURE OF THE RULING BELOW

Petitioner was arrested in Kanawha County on November 18, 2005, for driving under the influence of alcohol (hereinafter, "DUI"). On November 29, 2005, the Division entered an *Order*

of Revocation Implied Consent/DUI by which Petitioner's privilege to drive was revoked for six months for the DUI and one year for refusing the secondary chemical test. An administrative hearing was timely requested by Petitioner, and was held on September 20, 2006. On April 30, 2007, the Division entered a Final Order which upheld the revocation of Petitioner's driving privilege for six months for the DUI and one year for the refusal to take the secondary chemical test.

On or about March 29, 2007, Petitioner, by counsel, filed a *Petition for Judicial Review* in the Circuit Court of Kanawha County (Civil Action No. 07-AA-45), arguing that the Petitioner's due process rights were violated at the administrative level by shifting the burden of proof to the Petitioner; that there was a lack of reasonable suspicion to initiate the traffic stop; that the Commissioner improperly relied on the arresting officer's testimony regarding the field sobriety tests; and that the Hearing Examiner acted improperly in questioning the arresting officer.

By Order entered on October 25, 2007, the Honorable James C. Stucky affirmed the Final Order of the Commissioner and denied the *Petition for Judicial Review*.

On or about December 7, 2007, Petitioner filed the present *Petition for Appeal and Writ of Error*.

This Court granted the Petition for Appeal as to Assignment of Error No. 1 only, to-wit: Whether the arresting officer lacked the required suspicion necessary to initiate a traffic stop the evening of Strick's arrest.

II.

STATEMENT OF FACTS

On November 18, 2005, Officer C.J. Rider, Jr., (hereinafter, "Ofc. Rider") a patrol officer for the Charleston Police Department, conducted a traffic stop on Petitioner's vehicle. Transcript

of Administrative Hearing, September 20, 2006, at pages 4-5 (hereinafter, "Tr. at 4-5"). Ofc. Rider stopped Petitioner's vehicle due to defective equipment. The driver's side tail light was out. Tr. at 9, 10. While speaking to Petitioner, Ofc. Rider detected the odor of an alcoholic beverage on Petitioner's breath. Tr. at 5. Petitioner had bloodshot eyes and slurred speech. Tr. at 5. Ofc. Rider asked Petitioner to exit his vehicle to perform field sobriety tests. Tr. at 5. Petitioner was unsteady exiting his vehicle, was staggering when walking to the sidewalk, and was swaying while standing. Tr. at 5.

Petitioner failed three field sobriety tests and refused to submit to a preliminary breath test. Tr. at 5-7. Ofc. Rider arrested Petitioner and transported him to the Charleston Police Department for processing. Petitioner refused to take the Intoximeter test two times, so Ofc. Rider gave Petitioner a copy of the Implied Consent Statement and arrested him for first offense DUI. Tr. at 7.

III.

ISSUES PRESENTED

A. **WHETHER REASONABLE SUSPICION TO STOP A VEHICLE IS A REQUISITE TO LICENSE REVOCATION FOR DRIVING UNDER THE INFLUENCE.**

B. **WHETHER THERE WAS REASONABLE SUSPICION FOR THE STOP OF PETITIONER'S VEHICLE.**

IV.

STANDARD OF REVIEW

This Court applies the same standard of review that the circuit court applied to the Division's administrative decision, *i.e.*, giving deference to the Division's purely factual determinations and giving *de novo* review to legal determinations. In Syllabus Point 2 of *Choma v. West Virginia Div.*

of Motor Vehicles, 210 W.Va. 256, 258, 557 S.E.2d 310, 312 (2001), this Court held that: "'On appeal of an administrative [decision] ... findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.' Syllabus Point 2 (in part), *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996)." Likewise, "[e]videntiary findings made at an administrative hearing should not be reversed unless they are clearly wrong." Syllabus Point 1, *Francis O. Day Co., Inc. v. Director, Div. of Envtl. Prot.*, 191 W.Va. 134, 443 S.E.2d 602 (1994).

Moreover, as this Court explained in *Modi v. West Virginia Bd. of Medicine*, 195 W.Va. 230, 239, 465 S.E.2d 230, 239 (1995) (citation omitted),

> findings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of law. In other words, the findings must be clearly wrong to warrant judicial interference. Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal.

See also, *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995) (explaining that this Court "must uphold any of the [administrative agency's] factual findings that are supported by substantial evidence, and we owe substantial deference to inferences drawn from these facts"). In addition, "'The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.' Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996)." Syllabus Point 2, *Webb v. West Virginia Bd. of Medicine*, 212 W.Va. 149, 569 S.E.2d 225 (2002). Thus, "[t]he scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner." *Martin*, 195 W.Va. at 304, 465 S.E.2d at 406.

V.

ARGUMENT

A. IT IS NOT NECESSARY TO SHOW REASONABLE SUSPICION FOR THE STOP IN ORDER TO REVOKE PETITIONER'S LICENSE.

"The principal question at the [administrative] hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in the person's blood of eight hundredths of one percent or more, by weight." W. Va. Code § 17C-5A-2(d). Therefore, the "reasonable suspicion" standard, by which the validity of a stop is judged in a criminal context, has no applicability to the present case. The prolific evidence of the Appellant's having driven while under the influence of alcohol should not be excluded on the basis of the stop.

The exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights . . ." *U.S. v. Calandra,* 414 U.S. 338, 348 (1974)[1]. This Court has previously found that the exclusionary rule is inapplicable to civil cases. *State ex rel. State Farm Fire & Cas. Co. v. Madden,* 192 W.Va. 155, 451 S.E.2d 721 (1994): "The purpose was to preclude use of information gained by illegal or unethical activities. However, the exclusionary rule is not usually extended to civil cases." 192 W.Va. 163, 451 S.E.2d 729. This holding applies to the context of administrative license revocation proceedings for DUI.

The exclusionary rule is often used in the criminal context to suppress evidence obtained from an illegal search. In *Calandra,* the United States Supreme Court declined to extend the

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[1]West Virginia Constitution Article 6, § 3 is substantially similar to the Fourth Amendment of the United States Constitution.

exclusionary rule to grand juries. *Calandra* noted that a primary basis for applying the exclusionary rule is deterrence of unlawful police conduct: "the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." 414 U.S. 348. The Supreme Court reasoned:

> Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement. Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search.

Id.

The deterrent effect on unlawful police conduct is sufficiently strong in the criminal context that the rule need not be carried into the civil context to the detriment of the public. Police will be sufficiently deterred from making unlawful stops and searches because the evidence will be excluded in the criminal trial that the public safety need not be jeopardized by the forced exclusion of reliable and relevant evidence at an administrative DUI hearing. Neither the Fourth Amendment nor West Virginia Constitution Article 6, § 3 dictates that the exclusionary rule must be extended to drivers license revocation proceedings in West Virginia, where administrative license revocation proceedings and criminal DUI proceedings are two separate and distinct proceedings. *Mullen v. State, Division of Motor Vehicles*, 216 W. Va. 731, 613 S.E.2d 98 (2005); *State ex rel. Stump v. Johnson,* 217 W. Va. 733, 619 S.E.2d 246 (2005).

Since *Calandra*, the majority of states which have decided the issue have declined to apply the exclusionary rule in drivers license revocation proceedings. The majority of states which have ruled on this issue follow *Calandra*. In *Tornabene v. Bonine ex rel. Arizona Highway Dept.*, 54 P.3d 355 (Ariz. App. Div.2 2002), the Court of Appeals of Arizona held:

> § 28-1321(K) does not expressly require "a showing of reasonable suspicion for the stop" as a prerequisite for administrative suspension of a DUI arrestee's license. To judicially engraft that requirement into the statute, in our view, would be appropriate only if the Constitution compels us to do so.
>
> . . . .
>
> [A]ssuming arguendo that TAAP lacked reasonable suspicion under the Fourth Amendment to justify their stop of Tornabene's vehicle . . . suspension of her license under § 28-1321(K) would not necessarily be invalid on that basis unless the exclusionary rule were applied to the civil license suspension proceeding. Neither the United States Supreme Court nor any Arizona court has applied the exclusionary rule in a purely civil proceeding as a remedy for violation of the Fourth Amendment.

54 P.3d 363-64 (footnote omitted).

The statute at issue in *Tornabene* is substantially similar to W. Va. Code §17C-5A-2, and the reasoning of that court should be adopted by this Court to establish this point of law in West Virginia:

> [E]xclusion of evidence from the license suspension hearing would have little deterrent value as compared to the benefit of having otherwise reliable evidence that a motorist has been driving while intoxicated available to the ALJ. Moreover, applying the exclusionary rule in the administrative license suspension context would "unnecessarily complicate and burden" the proceeding, which is designed primarily to focus on the issue of whether the motorist was operating a vehicle under the influence of intoxicants. *Powell*, 614 A.2d at 1307; *see also Riche*, 987 S.W.2d at 334; *Owen*, 170 Ariz. at 513, 826 P.2d at 810. Based on our evaluation of the relevant policies

> and our weighing of the relative benefits and detriments, we hold that the exclusionary rule, although required to preserve and protect Fourth Amendment rights in the criminal context, should not be applied to civil license suspension hearings under § 28-1321(K).

54 P.3d 365.

Alaska is in line with the states which hold that the exclusionary rule is inapplicable in license revocation proceedings. In *Nevers v. State, Dept. of Admin.*, 123 P.3d 958 (Alaska 2005), that state's supreme court concluded:

> In sum, application of the exclusionary rule will hamper legitimate efforts to keep drunk drivers off the roads and complicate the administration of license revocations while adding minimal deterrence to unlawful police action. In addition, consideration of evidence obtained in violation of the Fourth Amendment does not undermine the procedural fairness of revocation hearings. For these reasons, we affirm the hearing officer's determination that the exclusionary rule is inapplicable to license revocation proceedings.

123 P.3d 966. *See also*, *Martin v. Kansas Dept. of Revenue*, 176 P.3d 938 (Kan. 2008); *Garriott v. Director of Revenue, State of Mo.*, 130 S.W.3d 613 (Mo. App. W.D. 2004); *Sullins v. Director of Revenue, State of Mo.*, 893 S.W.2d 848 (Mo. App. S.D. 1995); *Quick v. North Carolina Div. of Motor Vehicles*, 479 S.E.2d 226 (N.C. App. 1997); *Motor Vehicle Admin. v. Richards*, 739 A.2d 58 (Md. 1999); *Banner v. Commonwealth, Dept. of Transp., Bureau of Driver Licensing*, 737 A.2d 1203 (Pa. 1999); *Chase v. Neth*, 697 N.W.2d 675 (Neb. 2005); *Fishbein v. Kozlowski*, 743 A.2d 1110 (Conn. 1999); *Ascher v. Commissioner of Public Safety*, 527 N.W.2d 122 (Minn. App. 1995); *Powell v. Secretary of State*, 614 A.2d 1303 (Me. 1992); *Gikas v. Zolin*, 863 P.2d 745 (Cal. 1993); *Manders v. Iowa Dept. of Transp., Motor Vehicle Div.*, 454 N.W.2d 364 (Iowa 1990); *Kimber v. Director of Revenue*, 817 S.W.2d 627, 632 (Mo. App. 1991).

In *Albrecht v. State,* 173 W. Va. 268, 314 S.E.2d 859 (1984), this Court noted that emphasis should be on the evidence of intoxication:

> Much the same argument was advanced in [*State v. Byers,* 159 W.Va. 596, 224 S.E.2d 726 (1976)], which involved a similar factual situation, although it was a criminal prosecution where the standard of proof is much higher. We summarized the law in Syllabus Point 7:
>
> > "Where there is adequate evidence reflecting that a defendant, who was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication and had consumed an alcoholic beverage, a trial court may submit for jury determination the question of whether the defendant committed the offense of driving a motor vehicle while under the influence of intoxicating liquor."
>
> Accordingly, we believe that where, as here, there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol.

173 W.Va. 273, 314 S.E.2d 864 - 65.

In *Byers*, this Court, relying on the statutory language pertaining to DUI offenses, determined that an arrest is lawful if the arresting officer has "reasonable grounds" to believe the offense was committed. The *Byers* Court concluded that "The evidence reflecting symptoms of intoxication and consumption of an alcoholic beverage was sufficient to justify submission of the case to the jury." 159 W.Va. 609, 224 S.E.2d 734. More importantly, the *Byers* Court recognized that it is only the evidence of intoxication and consumption which is truly relevant to the question of whether a person was DUI.

Under the statutory scheme in place for DUI revocations in West Virginia, this Court can easily reconcile the balancing test between deterrent effect and cost to the public by excluding the evidence. Police are deterred from illegal searches because the evidence will be excluded at trial (thereby also preserving judicial integrity); while use by the Commissioner of the relevant and reliable evidence obtained following the stop may be used to achieve this Court's oft-cited goal of quick removal of drunk drivers from the roads. *Jordan v. Roberts*, 161 W. Va. 750, 758, 246 S.E.2d 259, 264 (1978) (noting "[i]n *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977), the Court emphasized 'the important public interest in safety on the roads and highways, and in prompt removal of a safety hazard' in sustaining an Illinois statute authorizing revocation of a driver's license for repeated traffic violations."); *Stalnaker v. Roberts,* 168 W. Va. 593, 599, 287 S.E.2d 166, 169 (1981) (finding "[t]he intent of the West Virginia traffic laws which provide that the commissioner of motor vehicles revoke the licenses of dangerous drivers is protection for the innocent public"); *State ex rel. Ruddlesden v. Roberts,* 175 W. Va. 161, 164, 332 S.E.2d 122, 126 (1985) (recognizing "[t]he drunk driving laws of this State are hardly remedial in nature. They are regulatory and protective, designed to remove violat[or]s from the public highways as quickly as possible."); *Shell v. Bechtold*, 175 W. Va. 792, 796, 338 S.E.2d 393, 396 (1985) (stating "[t]he purpose of the administrative sanction of license revocation is the removal of persons who drive under the influence of alcohol and other intoxicants from our highways . . . The revocation provisions are not penal in nature . . . and should be read in accord with the general intent of our traffic laws to protect the innocent public.") (internal citations omitted); *Johnson v. Commissioner*, 178 W. Va. 675, 677, 363 S.E.2d 752, 754 (1987) ("The administrative sanctions of license revocation is intended to protect the public from persons who drive under the influence of alcohol");

and *State ex rel. Hall v. Schlaegel,* 202 W. Va. 93, 97, 502 S.E.2d 190, 194 (1998) ("The purpose of the administrative sanction of license revocation, as we stated in *Shell v. Bechtold,* 175 W.Va. 792, 338 S.E.2d 393 (1985), 'is the removal of persons who drive under the influence of alcohol and other intoxicants from our highways.' *Id.* at 796, 338 S.E.2d at 396. This objective of removing substance-affected drivers from our roads in the interest of promoting safety and saving lives is consistent 'with the general intent of our traffic laws to protect the innocent public'"). *See also, State ex rel. Stump v. Johnson*, 217 W. Va. 733, 743 n.7, 619 S.E.2d 246, 256 n.7 (2005); *In re Petition of McKinney*, 218 W. Va. 557, 562, 625 S.E.2d 319, 324 (2005).

Although this Court addressed the issue of the validity of the stop in *Muscatell v. Cline,* 196 W.Va. 588, 474 S.E.2d 518 (1996), and determined that "reasonable suspicion" and not "probable cause" was the appropriate standard for determining whether the stop was valid, Appellee herein contends that neither of the foregoing criminal standards should be applied in administrative license revocation cases. Prior to *Muscatell* and since its issuance, the Appellee has acquiesced in requiring a showing of the validity of the stop. In other words, Appellee has willingly applied the exclusionary rule to rescind revocations in which there was no reasonable suspicion for the stop. However, upon Appellee's review of caselaw nationwide, as well as its own enabling statutes, it has become apparent that application of the exclusionary rule is not required by West Virginia's statutory scheme in administrative license revocation cases.

Inasmuch as this Court has not formerly dealt with the question whether the exclusionary rule applies to exclude evidence in an administrative proceeding, then, *Muscatell* cannot be used as a precedent dispositive of the present argument. "These cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill,* 511 U.S. 661, 678, 114 S.Ct. 1878, 1889 -

1890 (1994); "In order for a case to be precedent for another case, the court in the first case must have decided the issue presented in the second case." *Harper v. Virginia Dept. of Taxation,* 242 Va. 322, 326, 410 S.E.2d 629, 631 (Va. 1991); "It is a venerable principle that a court isn't bound by a prior decision that failed to consider an argument or issue the later court finds persuasive." *Miller v. California Pacific Medical Center*, 991 F.2d 536, 541 (9th Cir. 1993). Appellee is not seeking retroactive application of the exclusionary rule to its proceedings; it is seeking the review of this Court on an issue which is novel to the Court in this context.

Three states have affirmatively held that the exclusionary rule applies in administrative proceedings. In *State v. Lussier*, 757 A.2d 1017 (Vt. 2000), *reargument denied* (Jun 12, 2000), the majority did not accept the "deterrence" theory discussed in *Calandra, supra.* Rather, that court held that there was a need to "protect Vermont motorists from unwarranted governmental intrusions that are not based on articulable suspicion." 757 A.2d 1023. That court also assumed that its legislature intended that a constitutional stop was necessary to revocation: "Nothing in the language of § 1205 or the purpose behind the statute suggests that the Legislature intended otherwise." 757 A.2d 1020. Oregon and Illinois have also held that the exclusionary rule applies. *Pooler v. Motor Vehicles Div.*, 755 P.2d 701, 703 (Or. 1988); *People v. Krueger*, 567 N.E.2d 717 (Ill.App. 2 Dist. 1991).

The criminal proceedings which stem from the same arrest provide a sufficient deterrent to unlawful stops by police. Furthermore, no inferences as to the Legislature's intent in the drafting of W. Va. Code §§17C-5A-1 *et seq.* should be drawn. The statutes contain no requirement of a valid stop in order to find that there were reasonable grounds to believe a person was DUI.

This Court has expressly stated that administrative license revocation proceedings are civil in nature, and that a "revocation is an administrative sanction rather than a criminal penalty." *State*

ex rel. Dept. of Motor Vehicles v. Sanders, 184 W. Va. 55, 58, 399 S. E.2d 455, 458 (1990) (per curiam). *See also*, *Shumate v. West Virginia Department of Motor Vehicles*, 182 W. Va. 810, 814, 392 S.E.2d 701, 705 (1990) ("The statutory remedy with which the Department of Motor Vehicles is provided . . . is administrative, and, therefore, proceedings which take place pursuant to such statutory enactment are civil proceedings."). Therefore, there should be no exclusion of evidence of driving while under the influence of alcohol on the basis of the validity of the stop. Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol. *Albrecht v. State,* 173 W. Va. 268, 314 S.E.2d 859 (1984). Therefore, Judge Stucky's order must be affirmed.

B. IN THE ALTERNATIVE, THERE WAS REASONABLE SUSPICION FOR THE STOP OF PETITIONER'S VEHICLE.

Even if the Court declines to accept the argument set forth above, the Circuit Court's Order should be affirmed on the basis that there was in fact a valid stop of the Appellant in this matter. Judge Stucky clearly believed that Appellant was driving under the influence in this matter when he held: "sufficient evidence was presented to show that the Petitioner drove a motor vehicle in this state while under the influence of alcohol on November 18, 2005", and upheld "the Commissioner's revocation of Petitioner's privilege to drive a motor vehicle for a period of one year for refusing to submit to a designated secondary chemical test, and a concurrent period of six months for driving a motor vehicle in this state while under the influence of alcohol." Order at 3.

In this case, while Ofc. Rider was on patrol at 1:08 a.m., on November 18, 2005, he observed that Appellant's driver's side tail light was out while he was driving on Watts Street in Charleston. Tr. at 9, 10. It was nighttime, and Ofc. Rider stopped Appellant because of his defective equipment. Tr. at 10. Ofc. Rider would have been remiss in his duty if he had ignored the situation and failed to make an investigatory traffic stop. The propriety of Ofc. Rider's actions in effecting the stop are supported under the reasonable suspicion standard set forth in Syl. pt. 4, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994).

In *Stuart*, this Court held that reasonable suspicion is

> "a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." [*Alabama v. White*,] 496 U.S. at 330, 110 S. Ct. at 2416, 110 L. Ed. 2d at 309.

Stuart, 192 W. Va. at 432, 452 S.E.2d at 890. This Court concluded:

> Thus, police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle "has committed, is committing, or is about to commit a crime."

192 W.Va. 431-32, 452 S.E.2d 889-90 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). *See Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996). In determining whether the reasonable suspicion standard has been met, the reviewing court must look at the totality of the circumstances including the information in the officer's possession at the time of the stop. *Muscatell*, 196 W. Va. at 596, 474 S.E.2d at 526; *Stuart*, 192 W. Va. at 432, 452 S.E.2d at 890 (citing *White*, 496 U.S. at 330).

In *Muscatell*, this Court discussed *Stuart,* and showed clearly the "minimal level of objective justification" required in West Virginia for the officer to make a stop:

> In reaching its conclusion, the *Stuart* Court also defined the test for evaluating the facts in the application of the "reasonable suspicion" standard:
>
> > When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police.
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> Syl. pt. 2, *State v. Stuart, supra.*
>
> In *Stuart,* this Court offered further guidance on the constitutional parameters of a "reasonable suspicion" stop, as follows:
>
> > Although "[reasonable] suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence," *see United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1, 10 (1989), the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution nevertheless require that the police articulate facts which provide some minimal, objective justification for the stop. Specifically, in *Sokolow,* the Court stated: "The officer, of course, must be able to articulate something more than an 'inchoate and unparticularized suspicion or "hunch"'. . . . The Fourth Amendment requires 'some minimal level of objective justification' for making the stop." 490 U.S. at 7, 109 S.Ct. at 1585, 104 L.Ed.2d at 10. (Citations omitted). The criteria for reasonable suspicion to stop a vehicle are very similar to a street stop under Terry. Factors such as erratic or evasive driving, the appearance of the vehicle or its occupants, the area where the erratic or evasive driving takes place, and the experience of the police officers are significant in determining reasonable suspicion.
>
> *State v. Stuart*, 192 W. Va. at 433 n.10, 452 S.E.2d at 891 n.10.

Muscatell v. Cline, 196 W. Va. 596, 474 S.E.2d 526. The Court must consider the totality of the circumstances in making its determination in this case, therefore, it must consider the officer's experience, the time of day, and the burned out tail light, which occurred before Ofc. Rider turned on his blue lights. The *Stuart* Court's "totality of the circumstances" test was met in this case.

Other states and, significantly, the United States Supreme Court, have upheld officers' stopping an individual based upon the violation of a minor traffic rule even under the higher, "probable cause" standard. In *State v. Misuraca*, 276 S.E.2d 679 (Ga.App. 1981), the Court of Appeals of Georgia held:

> The ... Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest, to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

276 S.E.2d 683.

In *Wright v. State*, 612 S.E.2d 576 (Ga.App. 2005), the Georgia Court of Appeals discussed *Clark v. State*, 432 S.E.2d 220 (Ga.App. 1993), in its opinion affirming the stop of defendant's vehicle. In *Wright*, the defendant began traveling in the right lane, then moved to the left lane without signaling, then moved again in to the turn lane without signaling and turned through a yellow light onto another road. The *Wright* court held:

> She [Defendant] cites *Clark v. State*, 208 Ga.App. 896, 432 S.E.2d 220 (1993), for the proposition that, absent evidence that other motorists were endangered, a traffic stop based only on failure to use a turn signal is pretextual.
>
> We note first that the opinion in *Clark* is physical precedent only. [(FN1.) "A judgment which is fully concurred in by all judges of the Division is a binding

> precedent; if there is a special concurrence without a statement of agreement with all that is said in the opinion or a concurrence in the judgment only, the opinion is a physical precedent only." Court of Appeals Rule 33 (2004).] Further, in *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) the United States Supreme Court held that the temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the vehicle absent some additional law enforcement objective. "In other words, if the arresting officer witnessed the driver breaking even a relatively minor traffic law, a motion to suppress under the Fourth Amendment arguing that the stop was pretextual must fail." *State v. Reddy*, 236 Ga.App. 106, 108(1)(b), 511 S.E.2d 530 (1999).

612 S.E.2d 579-580. *See also, Dayton v. Erickson*, 665 N.E.2d 1091, 1097 (Ohio 1996) ("In the case at bar, Officer Klosterman clearly had probable cause to stop appellee based on the traffic violation (failure to signal a turn) which occurred in the officer's presence.")

In *Delaware v. Prouse*, 440 U.S. 648 (1979) "the patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and registration." *Prouse*, 440 U.S. at 650. The United States Supreme Court discussed *Prouse* in *Whren, supra*, in which the High Court reached a different result:

> Our opinion in *Prouse* expressly distinguished the case from a stop based on precisely what is at issue here: "probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations." *Id.*, at 661, 99 S.Ct., at 1400. It noted approvingly that "[t]he foremost method of enforcing traffic and vehicle safety regulations ... is acting upon observed violations," *id.*, at 659, 99 S.Ct., at 1399, which afford the "'quantum of individualized suspicion'" necessary to ensure that police discretion is sufficiently constrained, *id.*, at 654-655, 99 S.Ct., at 1396 (quoting *United States v. Martinez-Fuerte*, 428 U.S., at 560, 96 S.Ct., at 3084).

517 U.S. 817-818. In *Whren, supra*, the suspicions of the officers were aroused when the defendants waited at a stop sign for an unusually long time–more than 20 seconds.

In *State v. Legg*, "[i]t was the conservation officers' understanding that they could stop any person in the woods, and any vehicle on the road, with no probable cause to believe a crime had been committed and for no reason other than to conduct a 'game-kill survey.'" Legg, 207 W. Va. 686, 688, 536 S.E.2d 110, 112 (2000). Both *Prouse* and *Legg* are distinguishable from the present case, inasmuch as the vehicles in those cases were stopped without the officer's observing any traffic violations.

There was reasonable suspicion for the stop. Ofc. Rider's observation of Appellant's burned out tail light constituted the "minimal level of objective justification" for Ofc. Rider to effectuate a stop of his vehicle.

VI.

CONCLUSION

WHEREFORE, Appellee respectfully prays that the *Order*, entered October 25, 2007, be affirmed.

Respectfully submitted,

THE STATE OF WEST VIRGINIA, and JOSEPH CICCHIRILLO, COMMISSIONER OF THE WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

By Counsel,

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NO. 34135

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RYAN STRICK,

Petitioner Below/Appellant,

v.

THE STATE OF WEST VIRGINIA, AND JOSEPH CICCHIRILLO, COMMISSIONER; WEST VIRGINIA DIVISION OF MOTOR VEHICLES,

Respondent Below/Appellee.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, and counsel for Appellee, do hereby certify that the foregoing *Brief of Appellee* was served upon opposing counsel by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 28th day of July 2008, addressed as follows:

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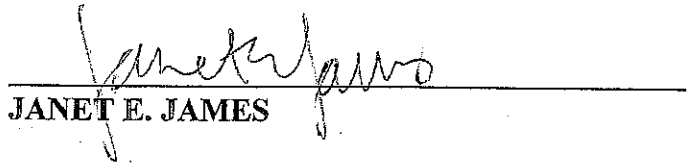

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